

STEVEN W. CALL (5260)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Email: scall@rqn.com

Attorneys for State Bank of Southern Utah

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

<p>STATE BANK OF SOUTHERN UTAH,</p> <p style="text-align: center;">Appellant,</p> <p style="text-align: center;">v.</p> <p>ALLEN BEAL,</p> <p style="text-align: center;">Appellee.</p>	<p style="text-align: center;">NOTICE OF APPEAL</p> <p style="text-align: center;">Case No. 2:20-cv-00298-DBB</p> <p style="text-align: center;">Judge David Barlow</p>
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NOTICE IS HEREBY GIVEN that State Bank of Southern Utah, the Appellant in the above-captioned case, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the District Court's *Memorandum Decision and Order Affirming Bankruptcy Court's Decision Granting Motion to Dismiss* that was entered on September 16, 2021, a copy of which is attached as **Exhibit A**; and from the *Order and Judgment Denying Motion to Extend Time, Granting Defendant's Motion to Dismiss and Dismissing Adversary Proceeding* entered by the Bankruptcy Court on March 31, 2020, a

copy of which is attached as **Exhibit B**, and from the corresponding *Memorandum Decision* entered by the Bankruptcy Court on March 31, 2020, a copy of which is attached as **Exhibit C**.

DATED this 15th day of October, 2021.

RAY QUINNEY & NEBEKER P.C.

/s/ Steven W. Call

Steven W. Call

Attorneys for State Bank of Southern Utah

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2021 I electronically filed **NOTICE OF APPEAL** with the Clerk of the Court using the CM/ECF system, which served notice of electronic filing to the ECF users registered to receive email notice/service for this case.

/s/ Lisa Conterio, Legal Assistant

1582044

Exhibit A

THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

STATE BANK OF SOUTHERN UTAH,

Appellant,

v.

ALLEN BEAL,

Appellee.

**MEMORANDUM DECISION AND
ORDER AFFIRMING BANKRUPTCY
COURT'S DECISION GRANTING
MOTION TO DISMISS**

Case No. 2:20-cv-00298-DBB

District Judge David Barlow

Allen Beal filed for Chapter 7 bankruptcy and State Bank of Southern Utah ("SBSU") planned to contest the discharge of certain debts in an adversary proceeding.¹ Counsel for SBSU did not successfully file a complaint before the 60-day deadline, and the Bankruptcy Court denied a motion to extend and dismissed the Bank's complaint.² Because the Bankruptcy Court did not err in finding that the complaint was filed late due to user error and in denying relief, the judgment below is AFFIRMED.

BACKGROUND

On January 15, 2019, Allen Beal filed a chapter 7 bankruptcy case; his meeting of creditors was scheduled for February 20, 2019.³ Under Federal Rules of Bankruptcy Procedure 4004(a) and 4007(c), the 60-day deadline for filing a complaint objecting to Beal's discharge and

¹ R. at 770.

² R. at 795.

³ R. at 770.

error and testified that he went through “many, many permutations” with or without dollar signs or commas until CM/ECF eventually advanced to the next page.¹³

After proceeding through another page, counsel arrived at a page titled “Open Adversary Case.”¹⁴ The Open Adversary Case page notes that there is a \$350 fee for filing the complaint, but the CM/ECF system does not allow the user to pay the fee until the filing process is complete.¹⁵ Counsel for SBSU claims that the screen contained a button labelled “Pay Next \$350” but the system would not advance when the button was clicked.¹⁶ Counsel testified that the CM/ECF system returned an error that he recalled as “Case opening failed. Writing answer record.”¹⁷ Gary Gfeller, the Bankruptcy Court’s Chief Deputy Clerk, testified that he was unfamiliar with this message and that the message would not make any sense, because for the system to write a record, there has to be an open case.¹⁸ During this process, counsel for SBSU contends that he attempted to use the browser’s “back” button multiple times to return to previous steps, but he does not contend he ever closed his browser or restarted his computer to attempt a hard reset to the filing process.¹⁹

Counsel surmised that he would not be able to file his complaint before midnight, and instead emailed a copy to Beal’s counsel.²⁰ After attempting to send the complaint to the

¹³ R. at 772.

¹⁴ *Id.*

¹⁵ R. at 772–73.

¹⁶ Am. Appellant Br., ECF No. 21, at 13. SBSU’s amended brief is not properly paginated; thus, any citations to the amended brief will include pincites that refer to the CM/ECF pagination of the PDF. The Bankruptcy Court found that, although counsel claims he attempted to pay the fee at this stage in the filing process, the page at this point in the process is not meant to accept payment. R. at 773. Furthermore, although counsel suggested that clicking the “Next” button should have opened a new window, court employees testified that no new window should appear at this point in the process. R. at 608, 773.

¹⁷ R. at 773.

¹⁸ R. at 704.

¹⁹ See R. at 774; ECF No. 21, at 22–23.

²⁰ ECF No. 21, at 23.

II. The Bankruptcy Court did not err in granting Beal’s motion to dismiss because SBSU did not timely file a complaint.

If a bankruptcy court is inaccessible, then the deadline for filing shifts to the next day.⁴⁶

To address potential malfunctions with the CM/ECF system, the Bankruptcy Court for the District of Utah enacted Local Rule 5005-2(g), which provides that “[a]n ECF Filer or other party whose filing is made untimely as the result of a technical failure by the court may seek appropriate relief from the court.”⁴⁷ Certainly, this rule provides an avenue for the bankruptcy court to fashion an equitable remedy for a late filing not caused by the fault of the user. But here, the Bankruptcy Court determined that the complaint was not timely filed;⁴⁸ that the Complaint was filed late due to user error, not system malfunction;⁴⁹ and that no other equitable relief was warranted.⁵⁰ This court reviews the Bankruptcy Court’s factual determinations under the clearly erroneous standard and its ultimate legal determination *de novo*.⁵¹

A. The Bankruptcy Court did not clearly err in determining that the complaint was not timely filed.

The Bankruptcy Court first addressed SBSU’s contention that it had filed its complaint in a timely fashion, but the CM/ECF system was malfunctioning and did not record the filing properly.⁵² The lower court found that SBSU filed its complaint at 12:16 AM on April 23 and failed to find any evidence that indicated that SBSU’s complaint was filed earlier but not

⁴⁶ Fed. R. Bank. P. 9006(a)(3).

⁴⁷ Bank. D. Ut. LBR 5005-2(g).

⁴⁸ R. at 783.

⁴⁹ R. at 789.

⁵⁰ R. at 791.

⁵¹ *In re Vaughn*, 765 F.3d 1174, 1180 (10th Cir. 2014) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)).

⁵² R. at 783.

user errors.⁵⁷ To support this conclusion, the Bankruptcy Court noted that the evidence demonstrated that the CM/ECF system was functioning correctly—SBSU’s counsel experienced no technical difficulties until he reached the CM/ECF page with the demand field;⁵⁸ the CM/ECF system correctly returned a “You have to enter a valid integer number” when counsel entered a dollar sign or commas in the demand field;⁵⁹ and counsel for SBSU ultimately succeeded in uploading and filing his complaint.⁶⁰ Thus, the Bankruptcy Court found that, at the very least, the CM/ECF system was functional for some of the time that SBSU’s counsel was attempting to upload the complaint and that it was very unlikely for the system to be rapidly toggling between short periods of functionality and error.⁶¹ The court ultimately found that the most likely explanation for counsel’s difficulties in filing the complaint was not that the CM/ECF system was malfunctioning intermittently but that “the supposed technical failures of CM/ECF were in fact user errors committed by [SBSU’s counsel].”⁶²

This court sees no basis for overturning these factual findings by the Bankruptcy Court. SBSU points to no evidence that would suggest that it was more likely that CM/ECF was periodically malfunctioning than that SBSU’s counsel was making mistakes in the electronic

⁵⁷ R. at 789.

⁵⁸ R. at 788.

⁵⁹ *Id.*

⁶⁰ R. at 789. In Argument VI.H, SBSU contends that the CM/ECF system was malfunctioning because it was abnormal that the Pay.Gov window did not open after the filing and instead opened the next morning, ECF No. 21 at 48. Regardless of this, the Bankruptcy Court’s factual finding that the system was functioning properly is amply supported by evidence. The contention that a post-filing event occurred belatedly does not make the Bankruptcy Court’s finding clearly erroneous.

SBSU also argues in Argument VI.E that court employee Gloria Igo reviewed the complaint in the morning and corrected the demand amount that counsel had entered so that it matched the complaint. *Id.* at 45–46. The fact that, after filing, a court employee made changes to the CM/ECF docket is immaterial to whether the CM/ECF system was malfunctioning at the time that counsel attempted filing.

⁶¹ R. at 789.

⁶² *Id.*

SBSU nonetheless contends that the Bankruptcy Court erred by not finding that the CM/ECF system malfunctioned in several distinct ways. First, SBSU argues that the filing direction in the demand field contained an instruction to include a dollar sign and was thus inaccurate.⁶⁶ The demand-entry page contains an input field that contains the following instruction: “Demand (\$000) _____.”⁶⁷ SBSU’s argues that this instruction “clearly implies that the amount to be inserted should include a dollar sign and that the bankruptcy court’s conclusion to the contrary is in error.”⁶⁸ But counsel’s misinterpretation of the allegedly ambiguous “(\$000)” does not constitute a CM/ECF malfunction. The Bankruptcy Court found that counsel

⁶⁸ *Id.*

“interpreted [the instruction] to require that he put in the amount of damages with a dollar sign,” but “[t]hat interpretation was incorrect.”⁶⁹ The Bankruptcy Court further found that “there is not evidence that any of the problems [counsel] faced on April 22 and 23 were technical failures.”⁷⁰ The fact that counsel misinterpreted this instruction does mean that a technical error existed in the CM/ECF system.⁷¹

Next, SBSU argues that the Bankruptcy Court’s finding that SBSU’s counsel did not enter a demand without a dollar sign are clearly erroneous.⁷² But SBSU misrepresents the Bankruptcy Court’s findings. The Bankruptcy Court found that counsel “never testified that he had removed the dollar sign from the demand field during *these attempts*,” referring to attempts made before 11:45 PM.⁷³ The Bankruptcy Court immediately then adds: “The time was then about 11:45 p.m. [Counsel] kept trying, going through ‘many, many permutations,’ some with dollar signs and some without, some with commas and some without.”⁷⁴ SBSU’s claim that the Bankruptcy Court found that counsel never attempted to enter the demand amount without a

⁶⁹ R. at 771.

⁷⁰ *Id.* at 789. It may be the case that counsel's misinterpretation of the demand field cost him a few minutes in filing, but there is insufficient record evidence that could cause this court to conclude that it caused him to file late. The Bankruptcy Court found that counsel logged on to CM/ECF at 11:40 PM and that he did not attempt to remove the dollar sign from the input until at least 11:45 PM. *Id.* at 771. Had counsel interpreted the demand field correctly it might have saved him a few minutes, but the complaint was filed 16 minutes late.

⁷¹ In Argument IX of the appellate brief, SBSU disputes the Bankruptcy Court's conclusion that SBSU's counsel was unfamiliar with the Bankruptcy filing system and requests that this court take judicial notice of five bankruptcy proceedings in which counsel was involved. ECF No. 21 at 54. Resolution of this factual dispute is unnecessary. But the court notes that the inference SBSU seeks—that its counsel was familiar with the filing system—makes its argument about filing instruction ambiguities more difficult, not less.

In Argument VI.D, SBSU also argues that “the evidence was conclusive that there is not a current manual for the [CM/ECF] System. *Id.* at 45. Whether or not there was a current manual for the system is wholly irrelevant to the question of whether the CM/ECF system was malfunctioning.

⁷² *Id.* at 42.

⁷³ R. at 771 (emphasis added).

⁷⁴ R. at 771–72.

dollar sign is entirely incorrect.⁷⁵ Furthermore, the Bankruptcy Court's determination that counsel did not attempt to use a dollar sign before 11:45 PM and then tried entering many permutations after 11:45 PM was not clearly erroneous—there is no evidence that counsel attempted to remove the dollar sign before 11:45 PM.

Next, SBSU contends that there was a technical error in the system because the browser's "back" button did not function properly.⁷⁶ Clicking the "back" button while in the filing process does not clear the metadata in the CM/ECF system and prevents the user from properly filing.⁷⁷ Only if the user logs out of CM/ECF or returns to the initial screen does the browser's cache clear and allow the user to begin the filing process anew without error.⁷⁸ SBSU contends that this amounts to a defect in the CM/ECF system.⁷⁹ The Bankruptcy Court found that a court administrator recommended that counsel "clear [his] cache and start over if [he] encounter[ed] those types of problems" and that he "never told [counsel] that the problems were due to malfunctions with the CM/ECF software."⁸⁰ This supports the Bankruptcy Court's factual determination that there was no malfunction with the CM/ECF system.

⁷⁵ The court finds counsel's mischaracterization of the Bankruptcy Court's finding disturbing. As noted above, SBSU's counsel cited one sentence from the Bankruptcy Court's opinion on this issue and left out the two sentences that immediately follow. The two sentences he excluded undercut his position. When this was pointed out by Beal's counsel in his brief (ECF No. 22 at 19–20), SBSU's counsel continued to ignore the sentences in the opinion which rendered the argument baseless, instead doubling down on the meritless claim that the "bankruptcy court found the Bank's Counsel never later attempted to enter the demand amount without a \$ sign." (ECF No. 25 at 18–19). Counsel must be much more careful in the future to make accurate and complete representations about the record.

⁷⁶ ECF No. 21 at 43.

⁷⁷ *Id.* at 15.

⁷⁸ *Id.*

⁷⁹ *Id.* at 43.

⁸⁰ R. at 781 n. 51. Even if this statement conflicts with that of SBSU's counsel, the Bankruptcy Court weighed the credibility of the testimony below and found that counsel's testimony was "marked by notable contradictions, imprecisions, and elisions in important areas." *Id.* at 782. This determination is best made by the trial court and this court will accept it on appellate review.

Finally, SBSU contends that the fact that the CM/ECF system would not advance when the “Pay Next \$350” button was clicked indicates that the system was malfunctioning.⁸¹ It argues that if a filer cannot get past the Next Pay button then a filing cannot be completed.⁸² The Bankruptcy Court held that SBSU’s counsel’s testimony was not credible with regards to what occurred when counsel attempted to pay the filing fee.⁸³ The court noted that no visual evidence was presented as to what difficulties counsel might have encountered in this stage of the filing process and that testimony from court employees indicates that at some point counsel did advance beyond the Next Pay screen.⁸⁴ The Bankruptcy Court’s factual finding that there was no malfunction with the Next Pay button was supported by evidence, based on its determination of the credibility of the witnesses, and not in clear error. Thus, this court finds no reason to overturn the factual finding. Furthermore, whether or not counsel was able to pay the \$350 filing fee or whether or not the Pay.Gov window opened has no effect on the timeliness of the complaint, as the filing fee can only be paid after filing is completed.⁸⁵ The Bankruptcy Court’s factual finding that there was no CM/ECF system malfunction was not clearly erroneous.

C. The Bankruptcy Court did not err in refusing to grant SBSU an extension of time to file the complaint.

The court now turns to the Bankruptcy Court’s ultimate legal determination not to grant an extension to file the complaint and to instead grant Beal’s motion to dismiss. The court

⁸¹ ECF No. 21 at 48.

⁸² *Id.* at 49.

⁸³ R. at 782.

⁸⁴ *Id.*

⁸⁵ R. at 773 (“it is always the case in CM/ECF that if a fee must be charged for filing a document, it will only be charged after the Notice of Electronic Filing (NEF) is finished, which indicates that the filing process has been completed.”). The court notes that “CM/ECF will open a window prompting the user to pay the fee now or defer payment until the end of the day, when the filer can pay for all fees incurred during the day. If the filer chooses to pay now, CM/ECF will direct the filer to an external website at Pay.gov.” *Id.* at 773 n. 19. This further supports the factual determination that whether counsel could pay the filing fee had no effect on the timeliness of the complaint.

⁸⁶ ECF No. 21, at 49. *See also* Fed. R. Bank. P. 9006(a)(3) (Unless the court orders otherwise, if the clerk's office is inaccessible . . . on the last day for filing under Rule 9006(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday. . . ."); Bank. D. Ut. LBR 5005-2(g) ("An ECF Filer or other party whose filing is made untimely as the result of a technical failure by the court may seek appropriate relief from the court.").

⁹¹ R. at 788.

the Bankruptcy Court's factual findings that it was user error, not system malfunction, that caused the late filing.

Given that the late finding was the result of user error, this court will not reverse the Bankruptcy Court's finding that relief under Local Rule 5005-2(g) would be inappropriate here. Certainly, Rule 5005-2(g) or analogous local rules provide an avenue for relief when late filing was caused by a technical failure outside of the filer's control.⁹² But when the late filing is due to the fault, neglect, or oversight of the filing party, the court is not obligated to extend the deadline.⁹³ Counsel, running out of time to file a complaint, made errors during the CM/ECF filing process that prevented him from meeting the deadline. The Bankruptcy Court did not err in concluding that the difficulties that SBSU's counsel faced were not caused by technical failures of the CM/ECF system, and thus relief is unavailable under Local Rule 5005-2(g).⁹⁴ Furthermore, the courthouse is not rendered "inaccessible" if user error, not technical failure, causes an untimely filing.⁹⁵ For that reason, relief under Bankruptcy Rule 9006(a)(3) is also

⁹² See *In re Schrag*, 464 B.R. 909, 918 (D. Or. 2011) (holding that relief under an analogous local rule was appropriate when there was an undisclosed technical error with the CM/ECF system that caused incompatibility with certain browsers). Cf. *In re Gibrick*, 561 B.R. 470, 476 (Bank. N.D. Ill. 2016) (holding that motion to dismiss was not warranted where it was conceivable that late filing was the result of a CM/ECF failure but noting that "the filing deadline is not extended, if the filer's own computer or connectivity problems are to blame.").

⁹³ See, e.g., *In re Sands*, 328 B.R. 614, 619 (Bank. N.D.N.Y. 2005) (holding that dismissal was warranted when counsel logged into the CM/ECF system 11 minutes before a deadline and a slow internet connection prevented them from timely filing); *In re Sizemore*, 341, B.R. 658, 660 (Bank. N.D. Ind. 2006) (holding that dismissal was warranted when counsel experienced computer problems while the CM/ECF system was functioning properly); *In re Wright*, No. CC-09-1388-DuMkJa, 2010 WL 6259968, at *2, 5 (B.A.P. 9th Cir. 2010) (holding that dismissal was warranted when counsel logged in 10 minutes before deadline and attempted to file complaint in PACER rather than CM/ECF); *In re Schwartz*, No. 5:09-cv-05831-EJD, 2012 WL 4344544, at *5-6 (N.D. Cal. 2012) (holding that dismissal was warranted where late filing was the result of counsel mistakenly relying on instructions on the district court's website instead of that of the bankruptcy court); *Nelroy Drugs, Inc. v. Rochester Drug Coop., Inc.*, No. 20-cv-06946-FPG, 2021 WL 1534730, at *4 (W.D.N.Y. 2021) (holding that dismissal of a motion to reconsider was warranted where the bankruptcy court sent out multiple notices of an upcoming CM/ECF system outage and appellants neither planned to file before the outage nor proactively sought an extension).

⁹⁴ R. at 789.

⁹⁵ E.g., *Sizemore*, 341 B.R. at 660.

entirely predicated on the fact that it would be unfair not to extend the filing deadline because the CM/ECF system was malfunctioning. As discussed earlier, the Bankruptcy Court did not err in finding that user error caused the complaint to be untimely filed. Therefore, *Themy* is not applicable here because the late filing was not the result of an error by the court—there is no mistake by the court that needs correcting. Thus, SBSU’s argument for equitable relief under 11 U.S.C. § 105(a) fails.¹⁰³

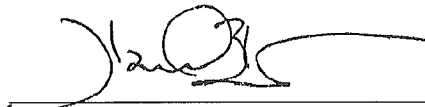
The court is sympathetic to the challenges counsel for SBSU experienced in attempting to file. Attempting to file so close to the deadline left little margin for error. And given that SBSU’s successful filing occurred very shortly after the deadline, the result seems harsh. But for the foregoing reasons, the Bankruptcy Court did not err in holding that user error, not system malfunction, caused the late filing and thus did not err in denying relief under Local Rule 5005-2(g) or 11 U.S.C. § 105(a).

ORDER

In conclusion, SBSU did not timely file its complaint. The Bankruptcy Court did not err in denying the Bank’s motion to extend the deadline and granting Beal’s motion to dismiss. The Bankruptcy Court’s decision is AFFIRMED.

Signed September 16, 2021.

BY THE COURT



David Barlow
United States District Judge

¹⁰³ SBSU also contends, in Argument X, that the Bankruptcy Court was mistaken in finding that the 16-minute filing delay caused Beal great prejudice. *Id.* at 55. Prejudice is irrelevant because, as explained above, SBSU is not entitled to equitable relief regardless of what prejudice Beal did or did not suffer.

STATE BANK OF SOUTHERN UTAH, Appellant, v. ALLEN BEAL, Appellee.	MEMORANDUM DECISION AND ORDER AFFIRMING BANKRUPTCY COURT’S DECISION GRANTING MOTION TO DISMISS Case No. 2:20-cv-00298-DBB District Judge David Barlow
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BACKGROUND

¹ R. at 770.

² R. at 795.

³ R. at 770.

to except debts from his discharge fell on April 22, 2019.⁴ Counsel for SBSU attended the meeting of creditors and scheduled a Rule 2004 examination of Beal for April 22 at 9:30 AM.⁵ The exam concluded around 3:00 PM, leaving counsel until the midnight deadline to file the complaint.⁶

SBSU’s counsel completed drafting the complaint (on which he had begun work prior to the Rule 2004 examination) at 11:24 PM, according to metadata on the document.⁷ He finished creating PDF files of exhibits at 11:36 PM and logged into the court’s Electronic Case Filing System (“CM/ECF”) at 11:40 PM, 20 minutes before the filing deadline.⁸

Once logged in to CM/ECF, SBSU's counsel experienced significant difficulties filing his complaint. He reached a page that requested the user to input a monetary demand in a field that read "Demand (\$000) ____."⁹ The "\$000" notation signifies that the demand should be entered in thousands of dollars, but counsel interpreted it to mean that he should include a dollar sign when entering a demand.¹⁰ If a filer inputs a symbol other than an integer, such as a dollar sign or comma, the CM/ECF system will return an error that reads, "You have to enter a valid integer number."¹¹ Counsel used a dollar sign when entering the monetary demand and testified that the form returned an error that he recalls as "integer missing."¹² He attempted to remedy the

⁴ *Id.*; Fed. R. Bank. P. 4004(a) (“a complaint . . . objecting to the debtor’s discharge shall be filed no later than 60 days after the first date set for the meeting of creditors. . . .”); Fed. R. Bank. P. 4007(c) (“a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors. . . .”).

⁵ R. at 770.

⁶ *Id.*

⁷ *Id.*

⁸ R. at 770–71.

⁹ R. at 771.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

error and testified that he went through “many, many permutations” with or without dollar signs or commas until CM/ECF eventually advanced to the next page.¹³

After proceeding through another page, counsel arrived at a page titled “Open Adversary Case.”¹⁴ The Open Adversary Case page notes that there is a \$350 fee for filing the complaint, but the CM/ECF system does not allow the user to pay the fee until the filing process is complete.¹⁵ Counsel for SBSU claims that the screen contained a button labelled “Pay Next \$350” but the system would not advance when the button was clicked.¹⁶ Counsel testified that the CM/ECF system returned an error that he recalled as “Case opening failed. Writing answer record.”¹⁷ Gary Gfeller, the Bankruptcy Court’s Chief Deputy Clerk, testified that he was unfamiliar with this message and that the message would not make any sense, because for the system to write a record, there has to be an open case.¹⁸ During this process, counsel for SBSU contends that he attempted to use the browser’s “back” button multiple times to return to previous steps, but he does not contend he ever closed his browser or restarted his computer to attempt a hard reset to the filing process.¹⁹

Counsel surmised that he would not be able to file his complaint before midnight, and instead emailed a copy to Beal’s counsel.²⁰ After attempting to send the complaint to the

¹³ R. at 772.

¹⁴ *Id.*

¹⁵ R. at 772–73.

¹⁶ Am. Appellant Br., ECF No. 21, at 13. SBSU’s amended brief is not properly paginated; thus, any citations to the amended brief will include pincites that refer to the CM/ECF pagination of the PDF. The Bankruptcy Court found that, although counsel claims he attempted to pay the fee at this stage in the filing process, the page at this point in the process is not meant to accept payment. R. at 773. Furthermore, although counsel suggested that clicking the “Next” button should have opened a new window, court employees testified that no new window should appear at this point in the process. R. at 608, 773.

¹⁷ R. at 773.

¹⁸ R. at 704.

¹⁹ See R. at 774; ECF No. 21, at 22–23.

²⁰ ECF No. 21, at 23.

incorrect email address, counsel delivered a second email to the correct address at 12:02 AM on April 23.²¹ The email stated that counsel had been “trying to file the Bank’s complaint for 25 minutes but there were problems with the software.”²²

After returning to the CM/ECF system, counsel finally successfully filed his complaint at 12:16 AM on April 23.²³ At 8:59 AM staff from counsel’s office paid the \$350 filing fee.²⁴

Because the complaint was filed 16 minutes after the 60-day deadline, SBSU filed a motion for extension of time for filing the complaint.²⁵ Beal objected to the extension and moved to dismiss the complaint.²⁶ The Bankruptcy Court held a two-day evidentiary hearing²⁷ and issued a decision denying SBSU’s motion for extension of time and granting Beal’s motion to dismiss on the basis that the untimely filing was caused by user error on the part of SBSU’s counsel.²⁸ SBSU timely appealed.

STANDARD OF REVIEW

A district court “review[s] the bankruptcy court’s legal determinations *de novo* and its factual findings under the clearly erroneous standard.”²⁹ “A finding of fact is clearly erroneous if it is without factual support in the record or if, after reviewing all of the evidence, [the district court is] left with the definite and firm conviction that a mistake has been made.”³⁰ If certain factual findings are based on “determinations regarding the credibility of the witnesses, Rule

²¹ R. at 774–75; ECF No. 21, at 23.

²² ECF No. 21, at 23.

²³ R. at 776.

²⁴ *Id.*

²⁵ ECF No. 21, at 26.

²⁶ *Id.*

²⁷ *Id.*

²⁸ R. at 769.

²⁹ *In re Miniscribe Corp.*, 309 F.3d 1234, 1240 (10th Cir. 2002) (internal quotations omitted); *Strong v. Prince, Yeates & Geldzahler*, 416 F. Supp. 3d 1300, 1308 (D. Utah 2019).

³⁰ *Id.*

To survive a Rule 12(b) motion to dismiss, “a complaint must contain enough allegations of fact, taken as true, to state a claim to relief that is plausible on its face.”³⁴ It is appropriate to resolve questions of timeliness on a 12(b) motion.³⁵

SBSU argues that the Bankruptcy Court erred in dismissing its complaint because its complaint was plausible on its face, and because the court below erred in finding that there was no malfunction in the CM/ECF system. SBSU makes twelve numbered arguments as to why the Bankruptcy Court erred.³⁶ The court initially addresses SBSU's first five arguments that the Bankruptcy Court erred because the complaint was facially plausible. Then, the court turns to

³⁶ See ECF No. 21 at 2–4.

examine SBSU's remaining seven arguments that the Bankruptcy Court erred in its factual determinations and in denying relief.

I. SBSU's Arguments I through V that the Bankruptcy Court erred in dismissing its claims based on the plausibility of the allegations are irrelevant because the Bankruptcy Court dismissed SBSU's claims based on timeliness.

SBSU makes an extensive argument that the Bankruptcy Court erred in dismissing parts of its complaint because, even if Beal's discharge was granted, it would not bar enforcement of the Bank's perfected security interests in collateral.³⁷ SBSU argues that its complaint included a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment, and thus "the claims satisfy the plausibility standard under *Twombly* and *Iqbal*."³⁸ Therefore, the Bank argues, the Bankruptcy Court's judgment dismissing the Bank's claims "must be reversed as a matter of law."³⁹ But the Bankruptcy Court's decision dismissing SBSU's claims was not based on federal pleading requirements. Rather, its decision was entirely predicated on the fact that SBSU failed to file its complaint in a timely manner.⁴⁰ The *Twombly* and *Iqbal* pleading requirements have no bearing on this appeal, as the only issue that the Bankruptcy Court addressed was whether to dismiss SBSU's complaint based on timeliness.

Beal also argues that SBSU waived the foregoing argument because it did not raise it before the Bankruptcy Court. In the Tenth Circuit, a district court that sits in appellate review of a bankruptcy court's decision may consider an issue not raised below if it concludes that the

³⁷ See Am. Appellant Br., ECF No. 21, at 32–39.

³⁸ *Id.* at 39.

³⁹ *Id.*

⁴⁰ R. at 795 ("SBSU's complaint was tardily filed, and the Court finds no basis to extend the time to file it under any of the theories proposed by SBSU. The Court will therefore deny SBSU's Motion to Extend and grant Beal's motion to dismiss.").

issue is dispositive and resolution of the issue does not require finding any additional facts.⁴¹ Thus, Beal is correct that SBSU did not raise these issues in the Bankruptcy Court, but incorrect that this court is absolutely barred from considering them because they were not properly preserved for appeal.⁴² Still, a prerequisite for this court to consider issues not raised below is that the issues in question are dispositive.⁴³ And the plausibility of SBSU's claims has no effect on the Bankruptcy Court's decision. The Bankruptcy Court granted the motion to dismiss entirely based on the timeliness of the complaint.⁴⁴ Even if SBSU's claims are plausible, it would not affect the outcome of the decision below because the complaint was dismissed based on the fact it was filed after the 60-day deadline.

Additionally, an appellate court generally should "refuse to consider arguments raised for the first time on appeal unless sovereign immunity or jurisdiction is in question."⁴⁵ Even if a district court has slightly more latitude to address newly raised issues in appeals from bankruptcy courts, there is no reason for this court to consider new issues that, given the Bankruptcy Court's ruling, have no bearing on the outcome of this matter. Furthermore, this court would not have the benefit of a fully developed record on these issues as they were not argued at the Bankruptcy Court. Given that they neither were argued below nor are dispositive, SBSU's Arguments I through V are not appropriate for resolution here and thus will not be considered on appeal.

⁴¹ *In re Hart*, 923 F.2d 1410, 1413–14, 1416 (10th Cir. 1991) (per curiam) ("The district court did not consider this issue, on the grounds that 'the issue is not before this Court on appeal.' However, the district court could have addressed the issue had it concluded that it was dispositive. (citations omitted)), *overruled on other grounds by In re Wicks*, 5 F.3d 1372, 1373 (10th Cir. 1993) (overruling *Hart* only to the extent it conflicts with *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993)).

⁴² See Appellee Br., ECF No. 22, at 2–4.

⁴³ *Hart*, 923 F.2d at 1413–14.

⁴⁴ R. at 795.

⁴⁵ *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir. 1995) (quoting *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir. 1992)).

II. The Bankruptcy Court did not err in granting Beal's motion to dismiss because SBSU did not timely file a complaint.

If a bankruptcy court is inaccessible, then the deadline for filing shifts to the next day.⁴⁶

To address potential malfunctions with the CM/ECF system, the Bankruptcy Court for the District of Utah enacted Local Rule 5005-2(g), which provides that “[a]n ECF Filer or other party whose filing is made untimely as the result of a technical failure by the court may seek appropriate relief from the court.”⁴⁷ Certainly, this rule provides an avenue for the bankruptcy court to fashion an equitable remedy for a late filing not caused by the fault of the user. But here, the Bankruptcy Court determined that the complaint was not timely filed,⁴⁸ that the Complaint was filed late due to user error, not system malfunction;⁴⁹ and that no other equitable relief was warranted.⁵⁰ This court reviews the Bankruptcy Court's factual determinations under the clearly erroneous standard and its ultimate legal determination *de novo*.⁵¹

A. The Bankruptcy Court did not clearly err in determining that the complaint was not timely filed.

The Bankruptcy Court first addressed SBSU's contention that it had filed its complaint in a timely fashion, but the CM/ECF system was malfunctioning and did not record the filing properly.⁵² The lower court found that SBSU filed its complaint at 12:16 AM on April 23 and failed to find any evidence that indicated that SBSU's complaint was filed earlier but not

⁴⁶ Fed. R. Bank. P. 9006(a)(3).

⁴⁷ Bank. D. Ut. LBR 5005-2(g).

⁴⁸ R. at 783.

⁴⁹ R. at 789.

⁵⁰ R. at 791.

⁵¹ *In re Vaughn*, 765 F.3d 1174, 1180 (10th Cir. 2014) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)).

⁵² R. at 783.

recorded by CM/ECF.⁵³ Thus, the court concluded as a finding of fact that SBSU filed its complaint on April 23, after the deadline.⁵⁴

The lower court's determination that SBSU's complaint was filed on April 23 was not clearly erroneous. The best indication of when the complaint was filed is, of course, the CM/ECF system's own time stamp. That evidence alone is enough to support the Bankruptcy Court's finding that the complaint was filed on April 23. The lack of evidence of any earlier filing further supports the Bankruptcy Court's factual finding.⁵⁵ The Bankruptcy Court's finding has extensive support in the record, and this court is under no impression that a definite mistake was made in the lower court's assessment of the facts. The Bankruptcy Court's finding that SBSU's complaint was filed on April 23 was not clearly erroneous. Thus, the court proceeds to analyze whether the Bankruptcy Court erred in finding that user error caused the late filing and refusing to permit SBSU to remedy its late filing.

B. The Bankruptcy Court did not clearly err in determining that user error, not system malfunction, caused the late filing.

The Bankruptcy Court made the factual finding that "there [was] no evidence of a technical failure" with the CM/ECF system when counsel for SBSU attempted to file the complaint.⁵⁶ Instead, the court concluded that any supposed technical failures were the result of

⁵³ R. at 783–84.

⁵⁴ R. at 784.

⁵⁵ In Argument VI.G of its appellate brief, SBSU argues that the Bankruptcy Court's finding that the complaint was filed on April 23 was clearly erroneous because of a discrepancy in the "filing date" of April 23 and "entered date" of April 22 on the CM/ECF case report. ECF No. 21 at 47. The Bankruptcy Court made the factual finding that this discrepancy is easily explained by the fact that counsel began the filing process before midnight but did not finish until the next morning. R. at 779–80. This finding of fact was not clearly erroneous because it was firmly supported by testimony from court employees. *Id.* at 779. In short, what matters is the filing date, not the entered date.

In Argument VI.F, SBSU also alleges that "numerous filing attempts were made prior to 12:16 AM." ECF No. 21 at 46. This is irrelevant. It has no bearing on the outcome of the case if counsel *attempted* to file before the deadline, only whether he *completed* filing before the deadline.

⁵⁶ R. at 788.

user errors.⁵⁷ To support this conclusion, the Bankruptcy Court noted that the evidence demonstrated that the CM/ECF system was functioning correctly—SBSU’s counsel experienced no technical difficulties until he reached the CM/ECF page with the demand field;⁵⁸ the CM/ECF system correctly returned a “You have to enter a valid integer number” when counsel entered a dollar sign or commas in the demand field;⁵⁹ and counsel for SBSU ultimately succeeded in uploading and filing his complaint.⁶⁰ Thus, the Bankruptcy Court found that, at the very least, the CM/ECF system was functional for some of the time that SBSU’s counsel was attempting to upload the complaint and that it was very unlikely for the system to be rapidly toggling between short periods of functionality and error.⁶¹ The court ultimately found that the most likely explanation for counsel’s difficulties in filing the complaint was not that the CM/ECF system was malfunctioning intermittently but that “the supposed technical failures of CM/ECF were in fact user errors committed by [SBSU’s counsel].”⁶²

This court sees no basis for overturning these factual findings by the Bankruptcy Court. SBSU points to no evidence that would suggest that it was more likely that CM/ECF was periodically malfunctioning than that SBSU’s counsel was making mistakes in the electronic

⁵⁷ R. at 789.

⁵⁸ R. at 788.

⁵⁹ *Id.*

⁶⁰ R. at 789. In Argument VI.H, SBSU contends that the CM/ECF system was malfunctioning because it was abnormal that the Pay.Gov window did not open after the filing and instead opened the next morning. ECF No. 21 at 48. Regardless of this, the Bankruptcy Court’s factual finding that the system was functioning properly is amply supported by evidence. The contention that a post-filing event occurred belatedly does not make the Bankruptcy Court’s finding clearly erroneous.

SBSU also argues in Argument VI.E that court employee Gloria Igo reviewed the complaint in the morning and corrected the demand amount that counsel had entered so that it matched the complaint. *Id.* at 45–46. The fact that, after filing, a court employee made changes to the CM/ECF docket is immaterial to whether the CM/ECF system was malfunctioning at the time that counsel attempted filing.

⁶¹ R. at 789.

⁶² *Id.*

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C. The Bankruptcy Court did not err in refusing to grant SBSU an extension of time to file the complaint.

⁸¹ ECF No. 21 at 48.

⁸² *Id.* at 49.

⁸³ R. at 782.

84 *Id.*

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Federal Rule of Bankruptcy Procedure 9006(a)(3) extends the filing deadlines in cases where the court is inaccessible.⁸⁸ The advisory committee comments to the 2009 amendment to the rules note that “the concept of [inaccessibility] will continue to develop through caselaw” and that “many local provisions address inaccessibility for purposes of electronic filing.”⁸⁹ The District of Utah Bankruptcy Court’s local rule addressing inaccessibility for the purposes of electronic filing states that “[a]n ECF Filer or other party whose filing is made untimely as the result of a technical failure by the court may seek appropriate relief from the court.”⁹⁰ The Bankruptcy Court found that application of this rule was inappropriate because there was no technical failure and the late filing was caused by user error.⁹¹ Nonetheless, SBSU contends that there were multiple defects in the CM/ECF filing process. As explained above, this court affirms

⁹¹ R. at 788.

The court is sympathetic to the challenges counsel for SBSU experienced in attempting to file. Attempting to file so close to the deadline left little margin for error. And given that SBSU's successful filing occurred very shortly after the deadline, the result seems harsh. But for the foregoing reasons, the Bankruptcy Court did not err in holding that user error, not system malfunction, caused the late filing and thus did not err in denying relief under Local Rule 5005-2(g) or 11 U.S.C. § 105(a).

In conclusion, SBSU did not timely file its complaint. The Bankruptcy Court did not err in denying the Bank's motion to extend the deadline and granting Beal's motion to dismiss. The Bankruptcy Court's decision is AFFIRMED.

BY THE COURT

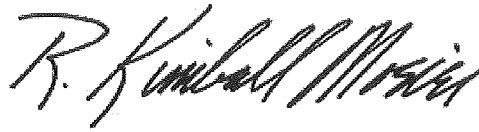
David Barlow
United States District Judge

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Exhibit B

This order is SIGNED.

Dated: March 31, 2020



R. KIMBALL MOSIER
U.S. Bankruptcy Judge



IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re:	
ALLEN BEAL,	Bankruptcy Case No. 19-20276
Debtor.	Chapter 7
STATE BANK OF SOUTHERN UTAH,	Hon. R. Kimball Mosier
Plaintiff,	
v.	Adversary Proceeding No. 19-2043
ALLEN BEAL,	
Defendant.	

ORDER AND JUDGMENT DENYING PLAINTIFF'S MOTION TO EXTEND TIME,
GRANTING DEFENDANT'S MOTION TO DISMISS,
AND DISMISSING ADVERSARY PROCEEDING

Plaintiff State Bank of Southern Utah filed a Verified Motion for Extension of Time for Filing Adversary Proceeding for Non-Dischargeability and Denial of Discharge Pursuant to 11 U.S.C. §§ 523 and 727 (Motion to Extend Time), seeking relief for commencing this adversary proceeding after the deadlines established by Fed. R. Bankr. P. 4004(a) and 4007(c). Defendant Allen Beal opposed the Motion to Extend Time and filed his Motion to Dismiss Adversary

Proceeding on the basis that the Plaintiff's complaint was untimely filed under Fed. R. Bankr. P. 4004(a) and 4007(c).

The Court conducted an evidentiary hearing on both motions. After thoroughly reviewing the evidence and assessing the credibility of witnesses; and having read the motions, memoranda, and briefs; and having heard the arguments of counsel and conducted its own independent research of applicable law, the Court issued its Memorandum Decision of even date. For the reasons set forth in the Memorandum Decision, which the Court incorporates herein by reference, the Court hereby **ORDERS**:

1. The Plaintiff's Motion to Extend Time is DENIED.
2. The Defendant's Motion to Dismiss Adversary Proceeding is GRANTED.
3. The above-captioned adversary proceeding is dismissed.

END OF DOCUMENT

_____000000_____

DESIGNATION OF PARTIES TO RECEIVE NOTICE

Service of the foregoing **ORDER AND JUDGMENT DENYING PLAINTIFF'S MOTION TO EXTEND TIME, GRANTING DEFENDANT'S MOTION TO DISMISS, AND DISMISSING ADVERSARY PROCEEDING** shall be served to the parties and in the manner designated below.

By Electronic Service: I certify that the parties of record in this case as identified below, are registered CM/ECF users:

Steven W. Call	scall@rqn.com, docket@rqn.com, lconterio@rqn.com
Justin Michael Kuettel	jkuettel@rqn.com, lbonnell@rqn.com
William P. Morrison	willmorrison01@gmail.com, G23388@notify.cincompass.com

By U.S. Mail: In addition to the parties of record receiving notice through the CM/ECF system, the following parties should be served notice pursuant to Fed. R. Civ. P. 5(b).

- None.

Exhibit C

the time counsel sought to file the complaint. SBSU subsequently filed a Verified Motion for Extension of Time for Filing Adversary Proceeding for Non-Dischargeability and Denial of Discharge Pursuant to 11 U.S.C. §§ 523 and 727 (Motion to Extend Time) on that basis.² In response, Beal filed a motion to dismiss this adversary proceeding as untimely filed.³

The Court conducted an evidentiary hearing on those motions. After thoroughly reviewing the evidence and assessing the credibility of witnesses; and having read the motions, memoranda, and briefs; and having heard the arguments of counsel and conducted its own independent research of applicable law, the Court issues the following Memorandum Decision denying SBSU's motion and granting Beal's motion.⁴

I. JURISDICTION

The Court's jurisdiction over this adversary proceeding is properly invoked pursuant to 28 U.S.C. § 1334 and § 157(b)(1). SBSU's complaint seeks to except a debt from Beal's discharge and to deny that discharge entirely, making this a core proceeding within the definition of 28 U.S.C. § 157(b)(2)(I) and (J), and the Court may enter a final order. Venue is appropriate under 28 U.S.C. § 1409.

² SBSU filed duplicate motions in this adversary proceeding and the main case. This decision covers both motions and related filings, but for simplicity's sake only refers to those in the adversary proceeding.

³ Beal had also filed a motion to strike certain facts from the Motion to Extend Time on the basis that they were hearsay or lacked foundation. Because the Court resolved the Motion to Extend Time through an evidentiary hearing, it is not necessary to consider the motion to strike.

⁴ This Memorandum Decision constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a), made applicable in adversary proceedings by Fed. R. Bankr. P. 7052. Any of the findings of fact herein are deemed, to the extent appropriate, to be conclusions of law, and any conclusions of law are similarly deemed, to the extent appropriate, to be findings of fact, and they shall be equally binding as both.

II. FINDINGS OF FACT

Beal filed his chapter 7 case, out of which this adversary proceeding arises, on January 15, 2019. His meeting of creditors under 11 U.S.C. § 341(a)⁵ was scheduled for February 20, 2019, causing the 60-day deadlines to file a complaint objecting to Beal's discharge under Rule 4004(a) and to except debts from his discharge under Rule 4007(c) to fall on April 22, 2019.

Steven Call made his appearance on behalf of SBSU on February 8. After attending Beal's § 341 meeting, he filed a motion on April 5 requesting authorization to conduct a Rule 2004 exam of Beal, which the Court granted that same day. Call then issued a subpoena duces tecum and ad testificandum to Beal, requiring the production of certain documents and scheduling the 2004 exam for April 22 at 9:30 a.m.⁶ Although there were some negotiations to start the exam later in the day or even move it to a different date, they were unsuccessful.⁷ The parties held the 2004 exam as scheduled and concluded at approximately 3:00 p.m., which left Call with about nine hours to file the complaint.

Prior to taking Beal's 2004 exam, Call and Justin Kuettel, an attorney working with Call on the case, had begun drafting an adversary complaint against Beal. After the conclusion of the 2004 exam Call revised the complaint. Metadata on the complaint show that Call began working on it at 4:21 p.m. and that he concluded his revisions at 11:24 p.m.⁸ Call then created PDF files of ten exhibits he intended to attach to the complaint. He finished that task at 11:36 p.m.,⁹ and

⁵ All subsequent statutory references are to title 11 of the United States Code unless otherwise indicated.

⁶ Docket. No. 22.

⁷ William Morrison, Beal’s counsel, had requested that the exam start at 11:00 a.m. In an email responding to Morrison’s request, Call stated: “I cannot grant a later start on April 22nd because, as you know, it is the bar date for the filing of the Bank’s complaint. Thus, I would be forced to work late if the examination runs late.” Ex. B, at 4. In a prior email to Morrison, Call had indicated that he believed the exam could take “most of the day.” *Id.* at 2.

⁸ Ex. 1.

⁹ Ex. 2. Of the ten PDF files, one had been created on April 5. Call created the remaining nine between 11:29 p.m. and 11:36 p.m. on April 22. *Id.*

misinterpretation. The title of the page means no such thing; the Court will not refuse to open an adversary proceeding for failure to pay the \$350 fee.¹⁸ In fact, it is always the case in CM/ECF that if a fee must be charged for filing a document, it will only be charged after the Notice of Electronic Filing (NEF) is finished, which indicates that the filing process has been completed.¹⁹ Importantly, the window to pay the filing fee does not appear until several pages after the Open Adversary Case page.

Despite that, Call testified that he attempted to pay the fee, using a credit card from his firm, at this stage of the filing process. But he did not explain clearly how he tried to pay a fee on a page that is not meant to accept payment. He suggested that clicking the “Next” button should have brought up a window where he could pay the fee, but when he did so, no window appeared. Clicking the “Next” button, however, does not create a new window at this stage of the filing process. Call has also suggested that he tried clicking the “Next” button, but the page would not advance. He testified that he made multiple attempts to pay the fee, but because the fee cannot be paid from the Open Adversary Case page, the Court is unsure what he was doing. Critically, Exhibit 3 does not include any screen shots of the pages that came after the Open Adversary Case page.²⁰ Whatever Call was doing, CM/ECF eventually gave him an error message that he remembered as “Case opening failed. Writing answer record.” Gary Gfeller, the Court’s Chief

¹⁸ Call admitted on cross-examination that he now understands that is the case. The Court also notes that the prior three pages in Ex. 3 also have the title “Open Adversary Case,” including the page that has the demand field. *See* Ex. 3, at Bates numbers HG000017-19. Due to the relative importance of the page at Bates number HG000020 in this decision, the Court refers to that page alone as the Open Adversary Case page to distinguish it from the other pages.

¹⁹ A filer need not pay the fee at that time. CM/ECF will open a window prompting the user to pay the fee now or defer payment until the end of the day, when the filer can pay for all fees incurred during that day. If the filer chooses to pay now, CM/ECF will direct the filer to an external website at Pay.gov.

²⁰ Nor does Ex. 3 purport to be a complete sequence of the screens in the process to file a complaint. There are admittedly screens missing from the sequence. What’s more, the screen shots were not created contemporaneously with Call’s actions on April 22 and 23, but were created some time afterward. *See* Hearing Transcript for Oct. 23, 2019, at 54:4-12.

SBSU000615

filing the complaint, Call made this statement: “After a significant amount of time and numerous attempts I inserted *an inaccurate number of 2000 and then it moved to the next window.*”³¹ The Court therefore finds Call’s testimony that CM/ECF did not accept the 2000 and 200 figures is not credible.

While Call advanced beyond that screen using all three numbers, the time he did so using the 200000 figure appears to be the one that led to the filing of the complaint, which occurred at 12:16 a.m. on April 23. The docket sheet for this adversary proceeding as of 9:19 a.m. that morning shows that the demand amount was initially \$200,000,000,³² which is consistent with Call entering 200000 into the demand field. Call then encountered the same problems with payment as he had before but was able to file the complaint without paying the \$350 fee. He left a message with Hurst to contact the Court first thing in the morning regarding payment of the fee. She did so and paid the fee at 8:59 a.m.³³

The Court requires that attorneys admitted to its bar register as ECF Filers.³⁴ In order to become an ECF Filer, an attorney must receive training on the CM/ECF program from Court staff.³⁵ Call received his training “many years ago” at approximately the time when the Court

³¹ Ex. 8, at Bates number HG000025 (emphasis added). The Court also notes that this email is consistent with SBSU’s Motion to Extend Time, which Call verified under oath as to the factual statements therein. In the relevant portion of the motion, Call stated that he had “inserted the random numbers of 200 or 2000 [into the demand field] and the system accepted the number and then advanced to the next window.” Docket No. 6, ¶ 13. All references to “Docket No.” are to documents filed in this adversary proceeding unless otherwise indicated.

³² Ex. 17.

³³ See Exs. 14 & 10.

³⁴ Bankr. D. Ut. LBR 5005-2(b). An ECF Filer is defined as a “person who is required to or has qualified to file papers using the courts [sic] Electronic Case Filing system.” Bankr. D. Ut. LBR 1001-1(d).

³⁵ See Bankr. D. Ut. LBR 5005-2(b)(2) (“Once registered and *training is complete*, the ECF Filer will receive notification of a user log-in and password.”) (emphasis added). The Court’s Electronic Case Filing (ECF) Registration Checklist, which prospective ECF Filers are to complete “along with [the] ECF registration form to report to the Utah Bankruptcy Court’s training department when ECF training was provided,” similarly states that “ECF Filers in the District of Utah must meet our training requirements prior to obtaining an ECF login and password.” United States Bankruptcy Court District of Utah, *Electronic Case Filing (ECF) Registration Checklist*,

In further support of its contention that Call had filed the complaint on April 22, SBSU introduced Exhibit 11, a case report generated by CM/ECF.⁴⁵ This case report lists the current adversary proceeding and, in the column labeled “Dates,” lists two relevant pieces of information: a “filed” date of April 23, 2019, and an “entered” date of April 22, 2019. The distinction between the meaning of filed and entered is best illustrated by non-electronic or “over the counter” filings received by the clerk’s office. If a party files a document shortly before the Court closes, the party will receive a stamp indicating that it was filed on that date. But the Court staff may not actually process the document and enter it into the CM/ECF system until the following business day. In this way, such a document would have a filed date one day earlier than its entered date.

Electronically filed documents are different, however. The CM/ECF system is designed so that the filed and entered dates for such documents match.⁴⁶ SBSU believes that because Exhibit 11 shows an entered date of April 22 for this adversary proceeding, that unambiguously indicates that the complaint was entered on that date. The Court disagrees because Gfeller’s testimony offered a clear explanation for the discrepancy between the entered and filed dates. He noted that the entered date indicates when CM/ECF creates a context file, which captures information at the time a filer starts a transaction in the program. When the filer completes the transaction, the context file distributes that information to relevant places in the database. Gfeller further stated that a filing process commenced before midnight but completed afterward will often generate the anomaly of an entered date preceding the filed date.⁴⁷ While this is an error, it is not an error that affected Call’s ability to file the complaint. Most importantly, the entered date

⁴⁵ Case reports list certain cases based on defined search criteria, such as cases filed within a particular date range.

⁴⁶ In any event, an entered date should not precede a filed date.

⁴⁷ Hearing Transcript for Oct. 24, 2019, at 148:20-151:3.

CM/ECF system to prove its case. SBSU contends that Call was the only person who testified as to what actions he took on April 22 and 23 and that there is not comparable evidence on that point. Moreover, SBSU asserts that Call's testimony has not been discredited, so it should be given particular weight and credibility. SBSU also emphasized that many of the facts Call testified to, including the times when he finished preparing the exhibits, logged in to CM/ECF, and emailed Morrison, are clearly corroborated by the evidence. Since he testified truthfully on those matters, SBSU implies that Call should be believed on the more contentious issues of fact, where corroborating evidence is lacking or, at best, equivocal.

The Court disagrees. In the first place, there are instances where Call's testimony was inconsistent with or not supported by the evidence. In addition to the examples noted above, a prominent example can be found in the email Call wrote to Morrison on the evening of April 23. Call informed Morrison that he had "discussed the matter with the Court's IP department and was told that the problems and error messages that [he] received reflect that the software was not operating correctly."⁵⁰ During his testimony, Call asserted that Russell Jones, the Court's UNIX System Administrator, had made that statement to him, but Jones denied it during his own testimony.⁵¹ The Court does not mean to suggest that Call fabricated facts outright. But Call had plainly already blamed CM/ECF for the filing difficulties before he spoke with Jones,⁵² and the most plausible explanation is that Call's confirmation bias changed what Jones said into what Call wanted to hear.

⁵⁰ Ex. 8, at Bates number HG000025.

⁵¹ Hearing Transcript for Oct. 24, 2019, at 133:13-17. Jones testified that Call reported that he had had trouble filing the complaint and had received certain error messages. Jones responded by stating that he commonly recommends that filers clear their cache or start over when they encounter those types of problems. *Id.* at 132:9-133:7. He never told Call that the problems were due to malfunctions with the CM/ECF software.

⁵² See Ex. 6 (stating in a 12:08 a.m. email to Morrison that "there were problems with the software").

Moreover, Call's testimony was marked by notable contradictions, imprecisions, and elisions in important areas. A minor, though illustrative, example concerns his characterization of the message he received when he first tried to email the complaint to Morrison as "strange." In the context of this dispute, a "strange message" is a loaded term, carrying with it the connotation that something beyond Call's ken had gone wrong with his computer. Rather than indicating that some unknown computer process had malfunctioned, however, this message merely illustrates that Call was rushed and made a mistake.

The most prominent example occurred when he attempted to explain the trouble he had in paying the \$350 fee. His initial testimony suggested that he attempted to pay the fee on the Open Adversary Case page but could not. This makes little sense because a filer does not pay a fee at that point in the filing process. Call then testified that CM/ECF would not advance when he hit the "Next" button, but Gfeller's testimony on Exhibit 14 shows that Call did get past that screen at some point, at which time he seems to have hit the back button on his browser multiple times. The lack of screen shots of the pages beyond the Open Adversary Case page substantially hampers the Court's ability to discern with detail what happened when Call tried to pay the fee. Call asserted that a CM/ECF malfunction caused the problems he experienced at that point in the filing process. But it is simply not possible to draw that conclusion based on the evidence.

III. CONCLUSIONS OF LAW

*“Courts used to say that a single day’s delay can cost a litigant valuable rights. With e-filing, one hour’s or even a minute’s delay can cost a litigant valuable rights. A prudent litigant or lawyer must allow time for difficulties on the filer’s end.”*⁵³

A. SBSU's Motion to Extend Time

Although SBSU's Motion to Extend Time initially asked for an extension of the deadlines under Rules 4004(a) and 4007(c), at the evidentiary hearing SBSU pursued a position not taken in that motion—i.e., that it filed the complaint timely on April 22. While the Motion to Extend Time is premised on the argument that a CM/ECF malfunction prohibited SBSU's counsel from timely filing the complaint, the contention that SBSU filed the complaint on April 22 is based on a different type of error, asserting that CM/ECF failed to properly register or document the initial filing of the complaint. The Court assigns SBSU, as the movant, the burden to prove that the CM/ECF system malfunctioned in the way it alleges. SBSU must make that showing by a preponderance of the evidence, the standard commonly applicable in civil actions.⁵⁴

The Court concludes that SBSU failed to carry its burden. It is undisputed that April 22 was the deadline for SBSU to file its complaint against Beal and, since SBSU's counsel is an ECF Filer, SBSU had until midnight Mountain Daylight Time to file it.⁵⁵ The evidence plainly shows, however, that SBSU filed its complaint at 12:16 a.m. on April 23. None of SBSU's exhibits, including the case report or the transaction log, show that there was an earlier filing that

⁵³ *Justice v. Town of Cicero, Ill.*, 682 F.3d 662, 665 (7th Cir. 2012) (citation omitted).

⁵⁴ See *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (“Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless ‘particularly important individual interests or rights are at stake.’” (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389–390 (1983))).

⁵⁵ See Fed. R. Bankr. P. 9006(a)(4)(A) (“[T]he last day ends: for electronic filing, at midnight in the court’s time zone.”).

SBSU also seeks relief under Fed. R. Bankr. P. 9006(a)(3), which provides in relevant part: “Unless the court orders otherwise, if the clerk’s office is inaccessible . . . then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday.” Traditionally, Rule 9006(a)(3) and its word-for-word analogue, Rule 6(a)(3), were limited “to situations in which the courthouse is physically inaccessible.”⁶³ Inaccessibility referred to “weather or other conditions” that would cause a court to close.⁶⁴ For example, when the U.S. Bankruptcy Court in Chicago flooded on April 13, 1992, the court closed and extended the deadlines that fell on that day to the following day.⁶⁵

The text of the rule no longer refers to “weather or other conditions” as the reason for the inaccessibility of the clerk’s office. The reference to “weather” was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system.⁶⁶

⁶⁶ Fed. R. Bankr. P. 9006 advisory committee's note to 2009 amendment.

SBSU contends that it should receive relief under Local Rule 5005-2(g) because its counsel encountered a technical failure when, as he phrased it in closing argument, “he could not get the software to work properly.”⁷⁰ Local Rule 5005-2(g) provides that “[a]n ECF Filer or other party whose filing is made untimely as the result of a technical failure *by the court* may seek appropriate relief from the court.”⁷¹ This rule requires a party seeking relief to establish three elements: (1) the existence of a technical failure, (2) the failure was committed by the Court, and (3) the failure caused the party’s untimely filing. “[F]or a party to obtain relief pursuant to [this rule], it must establish that, but for the court-caused technical problem, it would

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advance beyond the demand field page was that he was entering dollar signs, commas, or other prohibited symbols and punctuation marks that would cause CM/ECF to issue an error message. In other words, CM/ECF worked correctly.

What's more, Call testified that he was able to upload his complaint to CM/ECF and, though it is not a complete series of screens in the process to file a complaint, Exhibit 3 shows that he proceeded through at least one more screen before reaching the Open Adversary Case page. This again evinces that CM/ECF was running as it was supposed to. SBSU introduced no evidence that a CM/ECF malfunction would manifest itself in such rapid toggling between periods of functionality and error. It would be an odd coincidence indeed for CM/ECF to run uneventfully when Call was performing the tasks that he could accomplish with little trouble, only to malfunction precisely at the time when he had to undertake the filing functions that gave him difficulties. Rather than concluding that CM/ECF conked out intermittently during just those times, but resumed normal operation afterwards, the far more likely explanation is that the supposed technical failures of CM/ECF were in fact user errors committed by Call.

There is no evidence that any of the problems Call faced on April 22 and 23 were technical failures. For that reason, the Court concludes there is no basis to grant relief under Local Rule 5005-2(g). As a result, the clerk's office was accessible within the meaning of Rule 9006(a)(3), and the Court will deny relief under that rule as well.

4. Section 105(a)

SBSU has also argued that the Court may use its equitable powers under § 105(a) to extend the deadline where the Court's actions have caused a party's failure to miss a deadline. In support of that argument, SBSU cites to *Themy*. In that case, the bankruptcy court sent out a notice advising creditors of the date on which a debtor's continued § 341 meeting would be

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or statute, despite a harsh result.⁹⁰ SBSU's complaint was tardily filed, and the Court finds no basis to extend the time to file it under any of the theories proposed by SBSU. The Court will therefore deny SBSU's Motion to Extend and grant Beal's motion to dismiss.

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⁹⁰ *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, ----, 135 S.Ct. 2158, 2169 (2015) (“Our unwillingness to soften the import of Congress’ chosen words even if we believe the words lead to a harsh outcome is longstanding,’ and that is no less true in bankruptcy than it is elsewhere.” (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 538, (2004))).

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